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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-90

DANIEL BURCH
and WRESTLE, INC.,
Petitioners,

versus

STATE OF LOUISIANA,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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STATEMENT OF THE CASE

Unless otherwise noted in argument, respondent concedes that the facts as set forth in petitioners' application and the opinion of the Louisiana Supreme Court are correct.

ARGUMENT

With one exception, which will be explained more fully below, respondent adopts the opinion of the

Louisiana Supreme Court as its reason why this writ application should be denied.

In pertinent part, said opinion is as follows:

"III. *Non-unanimous Six person Jury*

"By brief and argument in this court, the defendants for the first time contend that Louisiana law, which permits conviction by a non-unanimous six-person jury, offends the right of persons criminally accused of non-petty offenses to the jury trial guaranteed them by the Sixth and Fourteenth Amendments to the United States Constitution.[7]

"The defendants base their contention upon Ballew v. Georgia, ___ U.S. ___, 98 S.Ct. 1029 (1978). This decision held that trial before a five-person jury offends federal constitutional rights, even though a unanimous verdict is required.

"Initially, we are given concern because the alleged error was not raised by objection in the trial court at the time of the jury trial, La.C.Cr.P. art. 841, nor assigned as error, La.C.Cr.P. art. 920. It thus cannot be the subject of appellate review unless the error "is dis-

7 The right of a defendant in a criminal proceeding to a trial by jury guaranteed by the Sixth Amendment was held to be applicable to state criminal proceedings by virtue of the Fourteenth Amendment in Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444 (1968).

coverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." La.C.Cr.P. art. 921(2).

"Historically, our jurisprudence does not permit inspection of the trial transcript to ascertain such errors, see State v. Craddock, 307 So.2d 342 (La. 1975), but only of the pleadings and proceedings alone considered part of the record for purposes of patent-error appellate review — in general, the indictment or information, the minutes, and the verdict and sentence.[8]

"In this case, the minute entry shows that, after the jury brought in verdicts convicting both defendants of both counts, the jury was polled and had found the defendant Burch guilty by a vote of 5-1. Although the matter is not free from doubt[9], we have held without discussion that under such circumstances we may,

8 In State v. Sanford, 248 La. 630, 181 So.2d 50 (1965) we summarized the jurisprudence as holding that the record of the pleadings and proceedings, for purposes of determining patent error, 'includes the caption in the case, a statement of time and place of holding the court, the indictment or information with the endorsement, the arraignment, the plea of the accused, mention of the impaneling of the jury, verdict, and judgment of the court." 181 So.2d 51.

9 The essential basis for the defendants' contention is their attack on the constitutionality, under the federal constitution, of the provisions of state law which permit a non-unanimous verdict in six-person juries: La. Const. of 1974, Art. 1, Section 17; La.C.Cr.P. art. 782.

On the one hand, some jurisprudence provides that the grounds of unconstitutionality must first be asserted in the trial court. State v. Campbell, 263 La. 1058, 270 So.2d 506 (1973); State v. Kavanaugh, 203 La. 1, 13 So.2d 366 (1943);

from the minute entry, discover by mere inspection the basis for a defendant's contention that a non-unanimous jury verdict represents constitutional error patent on the face of the proceedings. State v. Bradford, 268 So.2d 781 (La. 1974); State v. Biagas, 260 La. 69, 255 So.2d 77 (La. 1971).

"We therefore consider on its merits the contention of the unconstitutionality of a non-unanimous verdict by a six-person jury.

"In Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893 (1970), the United States Supreme Court

City of Shreveport v. Pedro, 170 La. 351, 127 So. 865 (1930). On the other hand, the unconstitutionality of a statute *on which a conviction is based* may be noticed as patent error. State v. Stewart, 325 So.2d 828 (La. 1976). Yet, if a defendant withdraws in the trial court his attack upon the constitutionality of such a statute, his waiver precludes appellate review of (what under *Stewart* is patent constitutional) error in this regard. State v. Jones, 347 So.2d 200 (La. 1977).

We make no effort here to reconcile these conflicting principles enunciated by our jurisprudence. Arguably, although a noncurable attack upon the substantive statute upon which a conviction is based may be noticed at any time, a procedural deficiency (such as the alleged statutory provision for a non-unanimous jury verdict) should be raised in the trial court by appropriate motion or request for instructions, so as to enable the trial court to cure the deficiency; or else is waived. La.C.Cr.P. art 841.

Nevertheless, in view of the uncertainty of the jurisprudence, and because the constitutional error (if any) is based on a United States Supreme Court decision decided subsequent to the present conviction and is revealed by the minutes, we deem it to be appropriate here to consider the alleged constitutional error first raised in this court, without attempting at this time to resolve the conflicting jurisprudential principles as to whether or not the allegation represents unwaived patent error discoverable by mere inspection of the pleadings and proceedings.

upheld the constitutionality of the six-person jury in a state criminal trial. The court seemed to express its approval of the retention of unanimity on the six-person jury, but it did not decide the question of whether unanimity is an indispensable element of the Sixth Amendment guarantee to trial by jury.

"The question of unanimity of a jury verdict was raised in Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620 (1972). The court there held that Louisiana's twelve-person jury, wherein nine persons (before the 1974 state constitution raised the requirement to ten) must concur to reach a verdict in order to subject a defendant to punishment necessarily at hard labor, did not violate the defendant's right to due process or equal protection.[10]

"The 1974 Louisiana constitution provides for a jury of six for lesser felonies, five of whom must concur to render a verdict. Article 1, Section 17. This changed the prior state constitution's provision for a jury of five in such instances, with a requirement of a unanimous verdict (similar to the Georgia jury provision

10 This court has previously held that La.C.Cr.P. art. 782's provision for non-unanimous verdicts of twelve-person juries does not offend equal protection of due process of the federal or state constitution (State v. Ledet, 337 So.2d 112 (La. 1976); State v. Ross, 320 So.2d 177 (La. 1975); State v. Bradford, 298 So.2d 781 (La. 1974); State v. Blackwell, 298 So.2d 798 (La. 1974) or a defendant's right to be presumed innocent until found guilty beyond a reasonable doubt. State v. Ledet, supra.

invalidated earlier this year by the United States Supreme Court in *Ballew*).

"In his commentary upon the 1974 provision, Professor Lee Hargrave, Coordinator of Research for the constitutional convention, expressed the view that this change to non-unanimity did not offend the federal constitution: "If 75 percent concurrence (9/12) was enough for a verdict as determined in *Johnson v. Louisiana*, 406 U.S. 356 (1972), then requiring 83 percent concurrence (5/6) ought to be within the permissible limits of *Johnson*." Hargrave, The Declaration of Rights of the Louisiana Constitution of 1974, 35 La.L.Rev. 1, 56 (fn. 300) (1974).

"We accept this view as still valid, despite the recent decision in Ballew v. Georgia, ___ U.S. ___, 98 S.Ct. 1029 (1978). *Ballew* rejected Georgia's contention that the retention of the unanimity requirement in its five-person jury satisfied the requirements of the federal constitution's guarantee of the right to trial by jury for a criminally accused through the Sixth and Fourteenth Amendments.

"In doing so, the court stated: 'Our concern has to do with the ability of the smaller group to perform the functions mandated by the Amendments. That a five-person jury may return a unanimous decision does not speak to the questions whether the group engaged in meaningful deliberation, could remember all

the important facts and arguments, and truly represented the common sense of the entire community.' 98 S.Ct. at 1039-40.

"Earlier, in *Williams*, the court had held that a *six*-person jury was of sufficient size to promote adequate group deliberation, to insulate members from outside intimidation, and to provide a representative cross-section of the community. These values, which *Ballew* held a five-person jury is inadequate to serve, are not necessarily defeated because the six-person jury's verdict may be rendered by five instead of by six persons.

"The six-person jury will still presumably engage in the longer deliberations involving more communication that the court found adequately enhances greater verdict reliability and better community representation, despite (see *Johnson*) the elimination of the requirement for unanimity in verdict. Or at least this court, indulging in the presumption of federal constitutionality which must be afforded to provisions of our state constitution, so concludes as to this close issue.

"We therefore do not find reversible merit to this contention."

State v. Wrestle, Inc. & Daniel Burch, ___ So.2d ___ (La. 1978).

The single exception noted above is this: since the verdict of the jury against petitioner, Wrestle, Inc., was unanimous, this petitioner is without standing to complain of the alleged unconstitutionality of the Louisiana procedural laws in question. Alternatively, as to Wrestle, Inc., the issue is moot.

CONCLUSION

The State of Louisiana therefore respectfully prays that petitioner's Application For A Writ of Certiorari to the Louisiana Supreme Court be denied and that the judgment of the Louisiana Supreme Court herein, affirming the convictions and sentences of petitioners, be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Response To Petition For A Writ Of Certiorari To The Supreme Court of Louisiana has been served upon petitioners by placing a copy of same in the United States mail, postage prepaid, addressed to:

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